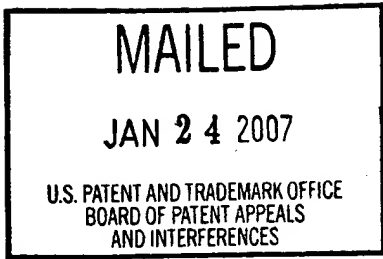


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.



UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTOPHER EVANS and RICHARD EVANS

Appeal No. 2006-1758
Application No. 09/493,871
Technology Center 3700

Decided:

Before TERRY J. OWENS, STUART S. LEVY and ANTON W. FETTING,
Administrative Patent Judges.

TERRY J. OWENS, *Administrative Patent Judge.*

DECISION ON APPEAL

This appeal is from a rejection of claims 7-11, which are all of the pending claims.

THE INVENTION

The appellants claim a soccer training device. Claim 7 is illustrative:

7. An apparatus for holding a soccer ball, comprising:

- a) a tie down stake having
 - i) a spiraled lower portion to be inserted into the ground; and
 - ii) a circular-shaped upper portion;

- b) a ring mounted loosely on said circular-shaped upper portion, said ring able to travel along a substantial portion of said circular-shaped upper portion, said ring to hold a tether to said tie down stake;
- c) a handle under said circular-shaped upper portion;
- d) a tether line which has one section which is elastic and another section which is non-elastic; and
- e) means for securing the soccer ball in a minimally interfering way with kicking, the securing means comprising a net for holding the ball tied to the inelastic section of the tether line, the tether line being tied at its ends to, and extending between, the ring and said means for securing; and
- f) means for enabling the tether line to rotate about its own axis, comprising a removable swivel connection between the ring and the tether line.

THE REFERENCES

Moore	4,147,353	Apr. 03, 1979
Sowards	4,720,095	Jan. 19, 1988
Ainscough et al. (Ainscough)	5,957,789	Sep. 28, 1999

THE REJECTION

Claims 7-11 stand rejected under 35 U.S.C. § 103 as being unpatentable over Moore in view of Sowards and Ainscough.

OPINION

We affirm the aforementioned rejection.

Moore discloses a soccer retriever anchored to the ground using a straight, 4" long tent stake (1) having a circular upper portion (col. 2, lines 6-7). One loop of an S-shaped hook (2) is attached to the circular upper portion, and the other loop of the S-shaped hook is attached to one end of a swivel (3) (col. 2, lines 11-13). The other end of the swivel is attached to a loop (4a) connected to one end of an elongated elastic shock cord (4), and the other end of the elastic cord is attached by a loop (4b) to one end of a braided nylon cord (5) (col. 2, lines 14-23). The other end of the nylon cord is connected to a ball holder (6) comprised of four straps (6a-d) connected to an elastic band (7) so that the straps fit around a soccer ball (8a) (col. 2, lines 29-48; figure 10).

Sowards discloses a soccer trainer comprising a spiral-shaped anchor (112) that has a circular upper portion (118) and is screwed into the ground using a handle (120) that is located below the circular upper portion and makes twisting the anchor into the ground easier (col. 4, lines 54-61; figure 10). Alternatively, the anchor can be a blade-type anchor that is driven into the ground (col. 5, lines 22-25).

Ainscough discloses a soccer trainer having an arm (23) attached at one end to a support pipe (46) and at the other end to a ring (22) connected to a swivel clamp (20) that can rotate 360 degrees (col. 2, lines 58-63; col. 3, lines 6-11). A substantially inelastic cord (16) is attached at one end to the swivel clamp and the other end to a net (14) for holding a soccer ball (12) (col. 2, lines 51-56; figure 1).

The appellants argue that Moore's S-shaped hook is not a ring (brief, page 9). Although each loop in Moore's S-shaped hook is not closed, it is essentially a ring. If the S-shaped hook cannot be properly considered a ring, then the ring-like shape of each loop at least would have fairly suggested a ring to one of ordinary skill in the art. Moreover, Ainscough's disclosure of a ring (22) for holding a soccer ball to a support (col. 2, line 58) further would have fairly suggested, to one of ordinary skill in the art, the use of a ring in Moore's soccer retriever.

The appellants argue that Moore, Sowards and Ainscough would not have fairly suggested, to one of ordinary skill in the art, the use of a net as a ball holder or the use of an elastic-inelastic tether line (brief, pages 9-11). Moore discloses what reasonably appears to be an elastic-inelastic

tether line (4, 5; col. 2, lines 14-17 and 21),¹ and a soccer ball holding net is disclosed by Ainscough (14; col. 2, lines 52-53).

The appellants argue that Sowards would not have suggested using a spiral stake in Moore's soccer retriever because Sowards' soccer ball is limited to rocking movement about the ring at the top of the stake and, therefore, has no realistic motion to simulate a true soccer pass or kick (brief, page 10). Although Sowards' soccer ball is attached to the ring at the top of the stake (figure 10), Sowards does not indicate that the spiral stake can be used only with that ball attachment. The appellants argue that tent stakes are hazardous because they dislodge from the ground, and that Sowards' teaching that tethering a soccer ball to an anchor with a long elastic cord requires a large flat area, poses a tripping hazard and causes a fixed and slow return time (col. 1, lines 13-24), teaches away from using the spiral stake in Moore's soccer trainer (brief, page 10). The disadvantages asserted by Sowards are unrelated to whether the anchor is straight or spiral, and it would have been readily apparent to one of ordinary skill

¹The elongated shock cord, but not the braided nylon cord, is disclosed as being elastic (col. 2, lines 15 and 21).

in the art that Sowards' spiral stake fastens the circular ring to the ground more securely than would a straight stake such as Sowards' blade-type anchor driven into the ground (col. 5, lines 22-25). Consequently, one of ordinary skill in the art would have been led by Sowards to use a spiral stake in Moore's soccer retriever to obtain more secure attachment to the ground.

The appellants argue that Ainscough's post extending upward from the ground interferes with a 360° kicking range (brief, page 10). Because that feature is unrelated to the use of a swivel clamp to hold a tether line or the use of a net to hold the ball, it would not have discouraged one of ordinary skill in the art from using a swivel clamp or net in Moore's soccer retriever.

The appellants argue that the devices of Moore and Sowards have distinct principles of operation that require distinct securing requirements (brief, page 11). The appellants argue that Sowards needs a more secure stake because the energy of the kick is immediately absorbed by the anchor and the ring connected to the ball (brief, page 12). That argument is refuted by the appellants' argument that prior rebounding-type soccer training devices that used tent stakes had to be recalled because kicks dislodged the stakes from the ground (brief, pages 8 and 12).

The appellants argue that there are differences in the principles of operation of the appellants' rebounding-type trainer and the trainers of Sowards and Ainscough (brief, page 12). That argument does not pertain to the relevant issue, which is whether one of ordinary skill in the art would have been led by the applied references to use in Moore's soccer trainer the features of Sowards' and Ainscough's trainers relied upon by the examiner.

For the above reasons we conclude that the appellants' claimed invention would have been *prima facie* obvious to one of ordinary skill in the art over the applied references. We therefore start anew and evaluate the appellants' rebuttal evidence along with the evidence upon which the conclusion of *prima facie* obviousness was based. See *In re Rinehart*, 531 F.2d 1048, 1052, 189 USPQ 143, 147 (CCPA 1976).

The appellants argue, in reliance upon four declarations by Christopher Evans, one of the inventors, that their year-after-year sales growth is evidence of commercial success because it can be attributed only to superior performance resulting from the features of the invention recited in the claims (brief, pages 6-7). We focus mainly on the most recent declaration, signed February

Appeal No. 2006-1758
Application No. 09/493,871

22, 2005, because it includes almost all of the points made in the prior declarations.

To overcome a prima facie case of obviousness, evidence of commercial success must show that there is a nexus between the sales and the technical merits of the claimed invention, i.e., that the sales resulted from the recited characteristics of the claimed invention rather than from another factor such as features of the product not related to the claimed subject matter, low price, marketing and salesmanship, customer service, or a prior business relationship between the company and its customers. See *In re Huang*, 100 F.3d 135, 140, 40 USPQ2d 1685, 1689-90 (Fed. Cir. 1996); *Kansas Jack, Inc. v. Kuhn*, 719 F.2d 1144, 1151, 219 USPQ 857, 861 (Fed. Cir. 1983).

Evans states in the declaration signed February 22, 2005 that the appellants' sales have increased year after year and that the appellants have sold over 36,000 units (§ 2). The appellants, however, have not provided evidence of increased market share. See *Kansas Jack, Inc. v. Kuhn*, 719 F.2d at 1151, 219 USPQ at 861. Evans states in that declaration that a number of competitors have marketed competing soccer trainers without any measurable diminution of the appellants' sales (§ 3), but that is not evidence of

increased market share. Evans states in the same declaration that Ainscough's trainer can no longer be found for sale and that Sowards' trainer is no longer sold by The Sports Authority (§ 7), but that also is not evidence of increased market share.

Evans states in the February 22, 2005 declaration that "[t]he product essentially 'sells itself', in that our company has undertaken no major advertising efforts such, for example, newspaper ads or infomercials, and remains without the resources or sales force of typical sporting goods companies, which employ marketing/advertising and the leveraging of other products to gain shelf space" (§ 4). Even if the appellants do not have the sales force of typical sporting goods companies and have not undertaken major advertising, that does not mean that the appellants' sales growth has been due to the merits of the claimed invention rather than being due to the success of the appellants' salesmanship and other factors such as low price and customer service.

Evans states in the February 22, 2005 declaration that the appellants' trainer has been designated the Official Licensed Bungee Soccer Trainer of the U.S. Soccer Federation (§ 5). The appellants, however, have not provided evidence

that the designation was the result of commercial success due to the merits of the claimed invention rather than being due to another factor such as professional relationships and donation of trainers to the federation.

Evans states that after the U.S. Consumer Product Safety Commission had two reports of children being struck by Franklin Sports' straight stake during unusual use, as indicated by the attachment to the declaration signed October 14, 2003, Franklin Sports voluntarily retrieved the stakes (declaration signed February 22, 2005, ¶ 8). Evans also states that catalog pages show that Penaltymaster® requires that a safety peg be used with its u-shaped anchor peg (declaration signed October 14, 2003, ¶ 7). Evans argues that if the appellants' solution of using a spiral stake to provide more secure attachment to the ground were obvious, it would have been adopted uniformly by the industry, yet a new trainer by Iso-Trainer™ has a straight stake (declaration signed February 22, 2005, ¶ 8). It is not apparent how that argument pertains to showing commercial success. It appears to be an argument that the claimed invention would not have been prima facie obvious.

Appeal No. 2006-1758
Application No. 09/493,871

Establishing a prima facie case of obviousness does not require showing a lack of uniform adoption by the industry. As discussed above, Sowards' disclosure (figure 10) of a soccer trainer having the spiral stake recited in the appellants' claims is sufficient for establishing a prima facie case of obviousness.

Evans states that he has been informed by a Modell's Sporting Goods buyer that Brine Sporting Goods has copied the appellants' soccer trainer (declaration signed June 16, 2004). The appellants have not provided evidence of the alleged copying, let alone evidence that shows its significance in relation to a determination of obviousness of the claimed invention.

For the above reasons we conclude that the evidence of obviousness of the claimed invention outweighs the evidence of nonobviousness.

Appeal No. 2006-1758
Application No. 09/493,871

JERRY COHEN, ESQ.
PERKINS, SMITH & COHEN, LLP
ONE BEACON STREET, SUITE 30
BOSTON MA 02108-3106